

COMMONWEALTH OF VIRGINIA

DELEGATE DANIEL MARSHALL, III, Chair
SENATOR MAMIE LOCKE, Vice-chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
201 NORTH 9th STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591 ext. 210
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.virginia.gov/commissions/vhc.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Affordable Housing, Real Estate Law, and Mortgages Work Group Thursday, July 14, 2016, 10:00 AM House Room C, General Assembly Building

I. Call to Order - Affordable Housing, Real Estate Law, and Mortgages Work Group

Delegate Christopher Peace, *Chair*, was delayed, so **Delegate Barry Knight** called the meeting to order at 10:00 AM.

Work Group members in attendance: Delegate Christopher Peace, *Chair*; Delegate Betsy Carr; Delegate Barry Knight; Senator George Barker; Sentaor William Stanley; Mark Flynn, *Gubernatorial Appointee*; Laura Lafayette, *Gubernatorial Appointee*; Neal J. Barber, *Community Futures*; Steve Baugher, *Virginia Association Mortgage Brokers*; Robert N. Bradshaw, *Independent Insurance Agents of Virginia*; Paul Brennan, *Virginia Housing Development Authority*; J. G. Carter, *Towne Bank Mortgage*; Tyler Craddock, *Manufactured & Modular Housing Association*; Heather M. Crislip, *President and CEO of HOME*; Chip Dicks, *Virginia Association of Realtors*; Andrew M. Friedman, *Virginia Beach Dept. of Housing & Neighborhood Preservation*; Brian Gordon, *Northern Virginia Apartment Builders Association*; Kelly Harris-Braxton, *Virginia First Cities*; Kelly King Horne, *Homeward*; Ralston King, *Whitehead Consulting*; Joe Lerch, *Virginia Association of Counties*; Renee Pulliam, *Virginia Apartment Management Association*; Jay Speer, *Poverty Law Center*; Elizabeth Steele, *Stewart Title*; Chris Thompson, *Department of Housing and Community Development*; Michael Toalson, *Home Builders Association of Virginia*; William Walton, *Real Property, Inc.*;

Staff: Elizabeth Palen, *Executive Director of VHC*

II. Real Estate Disclosures (HB 1264, 2016 Robinson)

- **Delegate Roxann Robinson:** When people move into a neighborhood without a home owners association (HOA), it does not mean there aren't covenants in place. There is concern that because it is not mandatory to disclose them without an HOA, there are people who do not know about covenants that apply to the area they are moving into.

DELEGATE DANIEL W. MARSHALL, III
DELEGATE DAVID L. BULOVA
DELEGATE BETSY CARR
DELEGATE BARRY D. KNIGHT
DELEGATE CHRISTOPHER K. PEACE

SENATOR MAMIE E. LOCKE
SENATOR GEORGE L. BARKER
SENATOR WILLIAM M. STANLEY

MARK K. FLYNN
LAURA D. LAFAYETTE
T.K. SOMANATH

- **Chip Dicks, Virginia Association of Realtors:** This bill being in the Commission is unusual because the bill passed. The reason this is brought to the Commission is to see if this is a Christmas tree bill and will become a problem.
 - In 1992, the Virginia Association of Realtors requested legislation to address the Residential Disclosure and Disclaimer Act. Part of the Act was hardly ever used, and the Act became all disclaimer and hardly any disclosure.
 - In 2001, through the Housing Commission a red-flag disclosure bill was created and adopted. This then became a Christmas tree bill. To address this, Delegate Miller in 2013 suggested we establish a process where DPOR puts on the website the current forms for the updated laws. Since then, there have been a number of clarifications.
 - This year, the clarification was made to help ensure that buyers look into covenants and restrictions in circumstances where there is no HOA.
- **Dicks:** In the opinion of the Virginia Association of Realtors, yes, this is a Christmas tree, but we've addressed that by having in on the Real Estate Board website. We don't know a better way to address this than the way it is now.
- **Laura Lafayette, Gubernatorial Appointee:** The process we have now works very well on a practical level.
- **Senator William Stanley:** In practice are real estate agents encouraged to go over each item in the packet?
 - **Dicks:** We train to have this discussion with their buyers. We encourage people to go on the website with their client and go through the forms.
- **Senator Stanley:** Are there any burdens or liabilities on that realtor who did not go over that even though you suggest that?
 - **Dicks:** They already have liability in that circumstance. If they fail to meet the standard of care, then they can have liability under their broker's agreement. I can't speak to the training for those not in the Virginia Association of Realtors.
- **Senator Stanley:** Of these 10 points in this packet, is it a breach of the standard of care to only go over eight of them?
 - **Dicks:** No, I believe it is the responsibility of the realtor to go over the form.
- **Robert N. Bradshaw, Independent Insurance Agents of Virginia:** This reminds me of insurance policies. I think this is going to have to evolve as technology evolves. It

seems that a buyer's agent should be going over each of these points with their client and not only some of them.

- **Dicks:** You must remember that this is a buyer beware state. What we have done is pass some statutes with red flags.
- **Delegate Christopher Peace:** Is there a list of the complaints to the Real Estate Board that would illustrate failure to do these things?
 - **Dicks:** They do have complaints. I do not know if they categorize them by the type of complaint.
 - **Mary Broz-Vaughan, Department of Professional and Occupational Regulation (DPOR):** I can't remember a specific complaint about this issue. The burden to provide the disclosure statement and have it signed applies whether or not you are represented by an agent.

III. Impact of Tenant Bankruptcies on Landlords

- **Senator William DeSteph:** There are two scenarios that had a major impact on apartment owners. In the first one, a resident stopped paying rent in September 2013. The apartment owner filed an unlawful detainer (UD) in November 2013 with a hearing set for December 2013. The resident filed for Chapter 13 protection in December 2013. The judge then stayed the eviction until the completion of the personal bankruptcy reorganization, which allowed the tenant to live rent-free.
 - When the bankruptcy was finalized, the judge ordered the tenant to begin paying rent again with an additional fee to pay back for previous rent. The tenant never paid any of the rent or past due rent and then was evicted. The apartment owner was left with over \$6,500 in lost rent, utilities, and legal fees.
 - At least four other individuals in that apartment building heard what happened and did the same thing. The total loss was over \$30,000.
 - In scenario two, the utilities on the apartment are submetered. The tenant didn't pay their utilities since November 2013. The matter was heard in general district court in February 2014. The judgment was for the defendant.
- **Senator DeSteph:** The tenant was non-renewed in February. They re-filed in March and the case was dismissed. They re-filed in May and the case was dismissed. The matter was then scheduled for September 2014 and continued until December 2014, where the judgment was for the defendant.

- The tenant appealed to circuit court, which stretched to January 2015 and continued until November 2015. In December 2014, the tenant started paying his rent in escrow. In November 2015, the circuit court ruled for the defendant, but the plaintiff was given 30 days to appeal before the escrow was released. The tenant appealed again. As of January 2016, the apartment owner has still not been paid either rent or utilities. It is ridiculous that the tenant is using the system to play against the apartment owner. The owner is now owed \$17,000 in rent and utilities.
 - How does the Housing Commission look at the impact of tenant bankruptcy proceedings and tweak it to ensure this does not happen?
- **Mark Flynn**, *Gubernatorial Appointee*: I've done executor contracts on expired leases on behalf of the creditors in the commercial context. That process does not apply here?
 - **Senator DeSteph**: Yes. And all the numbers I quoted to you did not include legal fees.
- **Jay Speer**, *Poverty Law Center*: Do you know whether the landlord's attorney filed a motion for relief from stay in the bankruptcy court?
 - **Senator DeSteph**: I don't know what the lawyers did or did not do.
- **Speer**: It seems to me you can get a relief from stay or file a motion. I believe an attorney can intervene in the bankruptcy.
 - **Senator DeSteph**: I believe that is what happened in the second case. There was a judgment to the defendant to release the escrow. But as of January 2016, the money had still not been released.
- **Delegate Peace**: My concern is that other tenants would see their rent increase as a consequence.
- **Dicks**: On the bankruptcy, I believe a tenant files bankruptcy. At that point there is an automatic stay where no state court for unlawful detainer can go forward. If this has already resulted in a money judgment, then that is enforceable. That gives you a preferred status as opposed to an unsecured status.
- **Delegate Peace**: Does that have to occur before the bankruptcy is filed?
 - **Dicks**: Yes. The landlord has to spend some legal fees and file an adversary proceeding requesting relief from the automatic stay. You ask the tenant to either affirm the lease or reject it. When it is affirmed, it is just like a

mortgage. They make it current and then pay it going forward. Most of the time, they reject it. That means two months' rent is at risk for the owner. The tenant is responsible for quantum meruit rent for the number of days the tenant is in the building after the bankruptcy court filing.

- We could do something in the process provisions in the Virginia law. With respect to the second case, there is definitely a process problem. One way to fix it is for a tenant to continue a case, all the landlord must do is ask that the rent be paid in escrow; and the judge is required to have it paid at the docket calling of the case. It may be an education issue that the owner must know to ask for the rent to be paid in escrow.
- There are other process issues, and it would be useful if the attorneys involved could communicate with us.
- **Senator Stanley:** A lot of rental agreements have default acceleration and termination clauses. There are penalties and forfeitures on these leases. Residential leases usually have first and last months' rent held as deposits by the landlord. Is there any mechanism for the landlord to find relief in the deposits?
 - **Dicks:** I think the escrow security deposit held in pre-paid rent is an asset of the bankruptcy estate. Federal bankruptcy court has jurisdiction over that until the adversary proceeding.
- **Senator Stanley:** Are you saying that the bankruptcy court could capture that money and then reallocate it to other debts.
 - **Dicks:** Yes, unless there is priority in judgment. It is worth looking into, but I don't know if there is much we can do about that. We can address the process issues if we better understand the details of the case.

IV. Companion Animals and Rental Property

- **Dicks:** Under the applicable disability laws, there is a lot of confusion about what constitutes a service, companion, or assistance animal. A service animal is limited to the Americans with Disabilities Act. It has to be a certified dog. The ADA only applies to apartment communities in public accommodation areas. Under the Fair Housing Law, if I have a handicap that substantially affects my life activities that is a physical or mental impairment, then I have a right as a tenant to ask a landlord to provide reasonable accommodation.
 - Accommodations are at the tenant's expense. The landlord is obligated to make reasonable modifications, which is not what we're discussing here. There is a requirement for practices, policies, and procedures, which pertains

to this issue. What constitutes a handicap? There is also a provision that states that the landlord cannot ask the tenant about the nature or extent of their handicap.

- There is a provision in HUD guidance that discusses a landlord asking for documentation that verifies the handicap and that you need a reasonable accommodation that pertains to the handicap. What's evolved is that there are internet providers that are giving people reasonable accommodation letters to get around pet deposits and pet rent.
- **Dicks:** The legislation I drew up gives a definition of assistance animal. There is also a definition of housing provider, and a new definition of mental impairment. The housing provider is allowed to ask if the assistance animal is required because of a disability. The housing provider may request reasonable accommodation from someone licensed in Virginia that has a therapeutic relationship with the request order.
 - If you misrepresent, it is a Class 4 misdemeanor. Anyone who is not a medical provider that gives an accommodation letter is violating the Consumer Protection Act. I suggest we look at the Consumer Protection Act and add a provision that applies directly to this.
- **Bismah Ahmed, Apartment & Office Building Association (AOBA) of Metropolitan Washington:** We have a lot of members coming to us with this issue. We have a five-minute video to share with you.
 - That video summarized our issues. I wanted to see how easy it was for myself. The results were shocking. We took a five-minute survey, with very leading questions. We never talked to anyone and yet within less than 24 hours we received our verification where a doctor approved us for a mental health condition. The process was very easy.
 - There is nothing we can do to pursue these false verifiers. These websites are aware of this, and they cover themselves in the small print.
- **Patrick McCloud, Virginia Apartment & Management Association (VAMA):** We came up with a third-party verification form that verifies the existence of the disability and need for the accommodation. We have a problem that is disenfranchising those with disabilities. The answer for what qualifies as verification is foggy.
 - We often find ourselves in a situation where we must accommodate those who are faking disability as they meet all the legal requirements.

- **John Cimino**, *Director of Public Policy, Virginia Board for People with Disabilities*: I do not support fraud, but I ask you to proceed with caution. We don't know exactly how prevalent these fraudulent websites are. Eleven percent of the population has disabilities, and a portion of those require animals to live in their homes and take advantage of opportunities.
 - For many, this can be an invisible disability, like PTSD or autism. We often find that the use of service assistance animals is on the rise for these conditions. There is a measurable benefit in people's lives. I encourage you to not make it harder for people with legitimate claims to get service animals. Housing discrimination against those with disabilities still exists. Discrimination complaints are most often those regarding people with disabilities.
 - We have concerns that state law fixes could end up butting heads with federal law. We encourage you to pull from federal guidelines.
- **Senator George Barker**: I think we need to take time to get this right before session.
- **Helen Hardiman**, *Director of Fair Housing, HOME*: There are still landlords that are not respecting fair housing law. When someone comes for assistance, we require credible documentation of their disability and need for the animal. We do not sugarcoat this. Two clients this year provided us with these online verification letters. We said it does not appear to be credible and asked them to find a local service provider to verify this. In both cases, the person was able to provide this documentation.
 - We had one client who couldn't provide this documentation after showing us an online verification letter. We are not helping people perpetuate fraud. I think landlords under existing law can already say no. This process of asking for reasonable accommodation is an interactional process.
- **Brian Gordon**, *Northern Virginia Apartment Builders Association*: The websites have the fine print saying these are not legal documents, but the letters they present are meant to look professional. For those that suspect that it's not a valid verification, we do not want a fair housing claim against us. We are hoping for some safe harbor.
 - **Hardiman**: If someone files a claim with us, it is at the intake stage; and if the disability cannot be verified, the claim is never filed.
- **Senator Barker**: We need to provide consistent guidance, so we get consistent decisions. This will both protect property owners and those with disabilities.

- **Hardiman:** Reasonable accommodations provided on a case-by-case basis with viable third-party verification. If we can clarify that without criminalization, then that seems like the solution to me.
- **Delegate Peace:** Does HUD provide legal opinions on these questions?
 - **Hardiman:** I have not been able to get HUD to weigh in on this.
- **Delegate Peace:** Perhaps our Commission would get more of a response from the federal government.

V. Public Comment

- **Delegate Peace** asked for any public comment.

VI. Adjournment

- Upon hearing no request to comment, **Delegate Peace** adjourned the meeting at 11:45 AM.